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December 21, 2011

Steven M. Gold, U.S.M.J.
United States District Court
Eastern District of New York
225 Cadman Plaza East, Courtroom 13-D
Brooklyn, NY 11201

Re: Michael A. Cortes v. Astoria NY Holdings LLC, et al.,
Case No. 11-CV-3062 (SJ) (SMG)

Your Honor:

Please accept this letter as a status report. At the last conference on November 26, 2012, Daniel Schick, an attorney, was present on behalf of the Defendants, and he was directed to file a notice of appearance by 11/27/12. No such notice has been filed, but understanding that he was new to the case, I made various efforts to contact him and reached him by phone on 12/18/12. He advised me that he had not yet been retained, and that there was a possibility that another attorney would be retained, and I requested that he send me an e-mail with status so I could submit same to the Court, and he assured me that he would do so no later than 12/19/12. I have not been able to reach him since.

Although your honor indicated that if no attorney appeared, Plaintiff could seek entry of a default against all Defendants except Aryeh Einhorn, who had appeared in *propria persona*, Plaintiffs' Third Amended Complaint was filed on November 26, 2012, after previous counsel was relieved (October 12, 2012). Although this claim did not add any new parties, it did add the retaliatory dismissal claims of several plaintiffs which had not been previously plead.

Pursuant to Federal Rule of Civil Procedure 5(a)(2), "[no] service is required on a party who is in default for failing to appear[, b]ut a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4." Thus, when a defendant is in default on one complaint, he need not be served with a subsequent complaint so long as the pleading does not add any claims or new factual predicates. *DeCurtis v. Upward Bound Int'l, Inc.*, 2012 U.S. Dist. LEXIS 143295, 14-15 (S.D.N.Y. Sept. 27, 2012), citing *Finkel v. Hall-Mark Elec. Supplies Corp.*, No. 07 Civ. 2376 (NGG), 2009 U.S. Dist. LEXIS 104887, 2009 WL 3401747, at *3 (E.D.N.Y. Oct. 21, 2009) [*15] (holding that defendant in default on original complaint need not be served with amended complaint where no claims were added against it);

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Johnson v. Dumphy, No. 09 Civ. 2758 (SMG), 2011 U.S. Dist. LEXIS 146389, 2011 WL 6101957, at *1 n.2 (E.D.N.Y. Nov. 14, 2011).

However, since new factual matter has been plead in the Third Amended Complaint and the defendants in default were not represented by counsel at the time of such amendment, to the extent that a default judgment would be predicated upon facts first alleged in a pleading with which they were never served, it would be subject to attack as a nullity. I did not effect service upon these defendants because I presumed that counsel would appear for them and accept service. Since this has not occurred, I am sending the Third Amended Complaint out to the process server for service upon all defendants other than Aryeh Einhorn. If counsel subsequently appears for these Defendants, and the Court sees fit to permit them to interpose a responsive pleading, I will request that the acceptance of their answer be conditioned upon the payment of the additional process service expenses and attorney's fees incurred by reason of their dilatory conduct to date.

Respectfully submitted,
LAW OFFICE OF WILLIAM CAFARO



William Cafaro (WC2730)
Attorney for Plaintiff

cc:

ASTORIA NY MOTORS LLC d/b/a
U – SAVE CAR & TRUCK RENTAL LGA,
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East Elmhurst, New York 11370

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Re: Michael A. Cortes v. Astoria NY Holdings LLC, et al.,
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DANIEL BARATAU
84-15 Astoria Boulevard
East Elmhurst, New York 11370

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Index No.: CV-11-3062 (SJ)

MICHAEL A. CORTES

Plaintiff,

-vs-

**AFFIDAVIT OF MAIL
SERVICE**

ASTORIA NY HOLDINGS LLC, et al.,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK)

Odaris Palacios, being duly sworn, says:

I am not a party to the action; I reside in Queens, NY and I am over 18 years of age.

On December 21, 2012 I served the within **Status Letter** by depositing a true copy thereof, enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the United States Postal service within New York State, addressed to the following at the last known address set forth below:

ASTORIA NY MOTORS LLC d/b/a
U – SAVE CAR & TRUCK RENTAL LGA,
84-15 Astoria Boulevard,
East Elmhurst, New York 11370


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ASTORIA NY HOLDINGS LLC d/b/a
U – SAVE CAR & TRUCK RENTAL LGA,
84-15 Astoria Boulevard
East Elmhurst, New York 11370

Sworn to before me
On December 21, 2012


Odaris Palacios


NOTARY PUBLIC

WILLIAM CAFARO
Notary Public, State of New York
No. 31-4869936
Qualified in New York County
Commission Expires Jan. 22, 2016 14